IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

WYNN RESORTS, LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI,

Respondent,

and

KAZUO OKADA; UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC.,

Real Parties in Interest.

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner Wynn Resorts, Limited is a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 17th day of July, 2015.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in Business Court." NRAP 17(a)(10); NRAP 17(e). Additionally, this Court should retain this matter because another writ proceeding involving the same case is presently pending before it: Case No. 68310.

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I. OVERVIEW AND RELIEF SOUGHT

Wynn Resorts, Limited ("Wynn Resorts" or the "Company") petitions this Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively, mandamus against the District Court's June 22, 2015 order (the "Order") for the very reasons this Court holds that writ relief is available to restrain overbroad discovery orders: The Order compels Wynn Resorts, under the threat of future sanction, to produce "any and all" documents for 78 distinct and sweeping document requests, untethered to any concept of relevancy to the matters at hand. It is the definition of a naked blanket discovery order.

As if that were not enough, the District Court's Order further transcends this Court's precedents by compelling the production of documents that both the gaming laws of Nevada and Macau declare to be confidential. Not only does the District Court's Order trample these explicit policy directives – of both Nevada and of a foreign sovereign – it does so without the slightest of findings or rationale. Indeed, there is no indication that the district court gave any heed to these policy directives. Respectfully, the judicial branch's control over discovery in litigation notwithstanding, courts should not run roughshod over explicit public policy and regulatory restrictions, particularly absent any evidentiary showing of relevancy or need.

The essence of the District Court's approach here – that these are large, well-heeled litigants with ample resources to comply with unbounded discovery – ignores this Court's teachings and only undermines the legitimate interest of litigants and the judicial process. No litigant should be held to have committed itself to unbounded and irrelevant discovery for the sake of having exercised its constitutional right to seek redress in Nevada's courts. Because that is what the District Court's blanket Order does here, Wynn Resorts seeks a writ to set aside that Order.

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II. ISSUE PRESENTED

Does a district court's order compelling broad discovery without regard to relevancy or proportionality and compelling the production of documents deemed protected by law warrant this Court's review by writ of prohibition or, alternatively, mandamus?

III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Wynn Resorts' Articles of Incorporation Provide for Redemption of Shares.

The geneses of the underlying litigation derive from provisions of Wynn Resorts' Articles of Incorporation ("Articles" or "Articles of Incorporation") known and agreed to by all stockholders, particularly Real Parties in Interest Aruze USA, Inc. ("Aruze"), its principal, Kazuo Okada ("Okada"), and parent, Universal Entertainment Corp. (collectively the "Okada Parties"). (Vol. IV PA 752-63.) Pursuant to those Articles, the Wynn Resorts Board of Directors, on February 18, 2012, redeemed all of the outstanding shares then held by Aruze. (Vol. III PA 700, Vol. IV PA 752-63.) The Board did so because it learned of serious misconduct by Okada and entities he controls, including Aruze, involving improper payments to Philippine gaming officials with regulatory authority over an Okada-sponsored casino development project in that country. (Vol. III PA 697-701, 704-750.)

As authorized by Article VII of the Articles, the Board redeemed Aruze's shares in exchange for a promissory note. (Vol. III PA 700-01, Vol. IV PA 752-63, 765-68.) Article VII empowers the Wynn Resorts Board to redeem the shares of any stockholder who the Board deems, in its sole discretion, to be an "Unsuitable Person" as the Articles define, most relevantly where the Board determines that continued ownership would jeopardize Wynn Resorts' existing gaming licenses or opportunities for additional licenses. (Vol. III PA 700, Vol. IV 758-62.)

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Upon Wynn Resorts' formation, stockholders – including the Okada Parties – agreed that the Company's Board shall have the power to redeem any shares held by any "Unsuitable Person" or its affiliates. (Vol. IV PA 760.) Each of the shares held by Aruze was emblazoned with a notice of Wynn Resorts' redemption rights upon their initial issuance. (Vol. IV PA 782, 950-51.) And as Section 2 of Article VII provides, in relevant part:

> Finding of Unsuitability. (a) The Securities Owned or Controlled by an Unsuitable Person or an Affiliate of an Unsuitable Person shall be subject to redemption by the Corporation, out of funds legally available therefor, by action of the board of directors, to the extent required by the Gaming Authority making the determination of unsuitability or to the extent deemed necessary or advisable by the board of directors . . . .

(Vol. IV PA 759.) "Unsuitable Person" is further defined as:

> [A] Person who (i) is determined by a Gaming Authority to be unsuitable to Own or Control any Securities or unsuitable to be connected or affiliated with a Person engaged in Gaming Activities in a Gaming Jurisdiction, or (ii) causes the Corporation or any Affiliated Company to lose or to be threatened with the loss of any Gaming License, or (iii) in the sole discretion of the board of directors of the Corporation, is deemed likely to jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for, right to the use of, or entitlement to, any Gaming License.

(Vol. IV PA 760.)[1] Thus, any stockholder who in the Board's "sole discretion" is "deemed likely to jeopardize" the Company's existing gaming licenses or the Company's ability to secure additional licenses in the future qualifies as an "Unsuitable Person." (*Id.*)

Wynn Resorts' Articles of Incorporation not only empower the Board to redeem the shares but also authorize the Board to determine the "Redemption Price"

[1] The Articles of Incorporation define the term "Gaming Licenses" to include "all licenses, permits, approvals, authorizations, registrations, findings of suitability, franchises, concessions and entitlements issued by a Gaming Authority necessary for or relating to the conduct of Gaming Activities." (Vol. IV PA 758.)

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to be paid. (Vol. IV PA 759, Vol. II PA 701.) Article VII provides that unless a gaming regulator mandates a particular price be paid, the price should be an "amount determined by the board of directors to be the fair value of the Securities to be redeemed." (Vol. IV PA 759.) In paying this "Redemption Price," the Wynn Resorts Board has the discretion to compensate the unsuitable stockholder with either cash or a ten-year promissory note with a prescribed interest rate of 2% per year (or some combination of the two). (*Id.*)

Simply put, Wynn Resorts' Articles of Incorporation reflect Nevada's fundamental and paramount public interest in gaming: The "probity" of gaming licensees and their associates. (Vol. III PA 547-49.) And, *all* Wynn Resorts stockholders – no matter the size of their holdings or perceived self-importance – are subject to these requirements.

B. Wynn Resorts Uncovers Improprieties by the Okada Parties.

Since sometime in 2007 or 2008, Okada has been engaged in promoting and financing a projected casino resort in the Philippines. (Vol. III PA 695.) At a meeting of the Wynn Resorts Board held on November 1, 2011, former Nevada Governor Robert Miller, the Chairman of Wynn Resorts' Compliance Committee, discussed the results of two independent investigations into Okada's activities in the Philippines. (Vol. III PA 697.) These investigations stemmed from concerns about the general compliance environment in the Philippines, a country where corruption is perceived to be widespread, and the risk that Okada's entities' activities there would create compliance-related problems for Wynn Resorts. (Vol. III PA 695-97.)

Governor Miller reported to the Wynn Resorts Board that the evidence uncovered prior to November 1, 2011 raised questions about Okada's suitability. (Vol. III PA 697.) Governor Miller advised the Board that, in light of the then-existing findings, the Compliance Committee intended to retain former federal judge and Director of the Federal Bureau of Investigation Louis Freeh ("Director Freeh") of Freeh Sporkin & Sullivan, LLP, to investigate Okada's

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activities. (*Id.*) Following Governor Miller's presentation, the Wynn Resorts Board ratified the Compliance Committee's decision to retain Director Freeh. (Vol. III PA 697-98.)

The investigation spanned the next three and a half months. (Vol. III PA 698.) Initially, Okada refused to even be interviewed, but ultimately relented and made himself available for a day, on February 15, 2012, as Director Freeh's investigation was concluding. (*Id.*) Shortly thereafter, Director Freeh presented the investigation's conclusions at a special meeting of the Wynn Resorts Board, along with a 47-page written report detailing the findings (the "Freeh Report"). (Vol. III PA 698, 704-50.)

Director Freeh first described the scope of his investigation, reported on impressions of the personal interview of Okada, and answered questions from the directors. (Vol. III PA 698-699.) As reflected in the Freeh Report, he advised the Board that Okada had not presented any exculpatory evidence – that is, evidence that would tend to contradict the findings – and that Okada's broad denials of any personal involvement were not credible in light of the evidence uncovered. (Vol. III PA 698, 750.)

Following the presentation, the Board adjourned for two hours to give the directors an opportunity to analyze the Freeh Report. (Vol. III PA 699.) The Freeh Report detailed findings that were incompatible with any legitimate business operator, much less for a Nevada gaming licensee:

- "Mr. Okada, his associates and companies appear to have engaged in a longstanding practice of making payments and gifts to his two (2) chief gaming regulators at the Philippines Amusement and Gaming Corporation," as well as their families and associates, in substantial amounts. (Vol. III PA 704.)
- "In one such instance in September 2010, Mr. Okada . . . paid the expenses for a luxury stay at [the] Wynn Macau by [PAGCOR] Chairman Naguiat," his family, and "other senior PAGCOR officials . . . . Mr. Okada and his staff intentionally attempted to disguise this particular visit by Chairman Naguiat by keeping his identity 'Incognito' and attempting to get Wynn Resorts to pay for the excessive costs of the chief regulator's stay, fearing an investigation." (Vol. III PA 705.)

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- "[D]espite being advised by fellow Wynn Resorts Board members and Wynn Resorts counsel that payments and gifts to foreign government officials are strictly prohibited" – including under the Wynn Resorts Code of Business Conduct and Ethics – "Mr. Okada has insisted that there is nothing wrong with this practice in Asian countries." (Vol. III PA 713.)
- "Mr. Okada has stated his personal rejection of Wynn Resorts anti-bribery rules and regulations, as well as legal prohibitions against making such payments to government officials, to fellow Wynn Resorts Board members." (*Id.*)
- Mr. Okada has "refus[ed] to receive Wynn Resorts requisite FCPA training provided to other Directors" and "fail[ed] to sign an acknowledgement of understanding of Wynn Resorts Code of Conduct." (Vol. III PA 705.)

The Board engaged in an extensive discussion of Director Freeh's presentation and the Freeh Report. (Vol. III PA 700.) During the course of its deliberations, the Board also considered advice from two highly-experienced attorneys in the applicable Nevada gaming statutes and regulations, Jeffrey Silver and David Arrajj. (*Id.*) At the conclusion of these discussions, and in light of the findings in the Freeh Report, Director Freeh's presentation, and the advice of expert gaming counsel, the Wynn Resorts Board (excluding Okada) unanimously determined – pursuant to the Company's Articles – that the Okada Parties were "Unsuitable Persons" whose continued affiliation with Wynn Resorts was "likely to jeopardize" the Company's existing and potential future gaming licenses. (Vol. III PA 700, 770.) Thus, the Board redeemed Aruze's shares.

Again, under the terms of Article VII, the redemption price could be paid wholly in cash, or with a ten-year promissory note bearing an annual interest rate of two percent, or by some combination of these two options. (Vol. III PA 700, Vol. IV PA 759.) The Board discussed with the Company's then-chief financial officer the effect on the Company's financial condition and flexibility under each of the alternatives. (Vol. III PA 700-01.) The Wynn Resorts Board also considered its duties to the Company's remaining stockholders in determining the method of payment. (Vol. III PA 701.) Based on all of these considerations, the Wynn

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Resorts Board (other than Okada) unanimously determined to pay the full amount of the redemption price by issuing a promissory note. (Vol. III PA 700-01, Vol. IV PA 765-68.)[2]

C. Wynn Resorts Reports the Unsuitability Determination and Sues to Enforce its Legal Rights.

That same day, Wynn Resorts informed the Nevada State Gaming Control Board as to its finding that Okada, Aruze, and Universal were "Unsuitable Persons" and that it had redeemed Aruze's shares pursuant to Article VII of the Articles of Incorporation. (Vol. III PA 701.) Wynn Resorts also informed the Gaming Control Board as to the issuance of the promissory note for the redeemed shares.[3] Wynn Resorts also acted promptly in pursuing legal relief against the Okada Parties, filing this action on February 19, 2012, and asserting claims for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. (Vol. I PA 1-21.)

In response, the Okada Parties sought to delay this matter with procedural maneuvering in the form of an improper removal to federal court that resulted in a remand and a sanctions award against the Okada Parties. (Vol. I PA 70-76, 192-95.) The Okada Parties also sought to distract from the unsuitability determination and redemption, and filed a 107-page answer and counterclaim,

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[2] Article VII required the Wynn Resorts Board to determine the "fair value" of Aruze's shares in setting the redemption price. (Vol. III PA 700, Vol. IV PA 759.) The Board received advice from an outside financial advisor, Moelis & Company, which presented the Board with a written report containing an analysis of a fair valuation range for Aruze's shares, taking into consideration provisions in a stockholders agreement that prohibited Aruze from transferring its shares without the consent of Mr. Wynn and Ms. Wynn, as well as the overall size of Aruze's block of shares. (Vol. III PA 700-01.) Following its review of the Moelis analysis, the Board (other than Okada) unanimously determined to apply a blended 30% discount to the public trading price of the Company's shares. (*Id.*)

[3] At no point has the Gaming Control Board disputed the Wynn Resorts Board's authority to redeem the shares of any stockholder the Board deems unsuitable, or the manner of payment for the redemption. (Vol. III PA 701.)

asserting the proverbial kitchen sink affirmative defenses, and twenty claims against the Company, its-then directors, as well as the Company's General Counsel. (Vol. I PA 77-191.)

The Okada Parties also sought a preliminary injunction from the District Court, asking it to, among other things, reverse the share redemption. (Vols. I-III PA 196-511.) The District Court denied the Okada Parties' request, finding that the business judgment rule applied to the Board's decision and concluding that Wynn Resorts had the reasonable likelihood of success. (Vol. V PA 1083-88.)

The case was also delayed when the United States Department of Justice intervened and asked the District Court for a stay due to its pending criminal investigation of the Okada Parties. (Vol. VI PA 1401-11.) That stay lasted approximately twelve months, and was ultimately lifted by the District Court despite the United States' request for a further extension as its investigation is ongoing. (Vol. VI-VII PA 1496-1504, Vol. IV PA 1505-13.)

Ever since, the Okada Parties' approach in discovery and to this litigation in general has become transparent and predictable: Needing to distract from the dispositive point – the Board's exercise of its business judgment in determining that the facts presented to it about the Okada Parties' activities (and Okada's refusal to provide any exculpatory evidence) jeopardized existing and future licensing – the Okada Parties seek to focus on anything and everything else, beginning with events preceding the 2002 creation of Wynn Resorts, and continuing through nearly every transaction and business relationship, and every contemplated transaction and business relationship since. (Vol. V PA 1089-1124 (1st), Vol. II PA 1514-59 (2d), Vol. XVII PA 1560-86 (3d), VIII PA 1893-1907 (4th).)

D. The District Court Orders Wynn Resorts to Respond to Every Discovery Request at Issue, Despite the Lack of Any Relevance.

The Okada Parties give new meaning to the phrase "scorched earth" tactics. To date, they have served over 900 different requests for production of documents

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to either Wynn Resorts or its individual Board members. Some 326 of these requests have been directed to the Company alone.[4] (Vol. V PA 1089-1124 (1st), Vol. II PA 1514-59 (2d), Vol. XVII PA 1560-86 (3d), VIII PA 1893-1907 (4th).) Consistent with its obligations and recognizing that the rules of discovery are broad, Wynn Resorts has agreed and is committed to responding to 192 of those requests in rolling productions as approved by the District Court. (Vol. VI PA 1277-1374 (1st), Vols. VII-VIII PA 1628-1796 (2d), Vol. XI 1797-1872 (3d).)[5]

But 78 of those requests – the subject of the District Court's Order – are breathtaking in their overbreadth and irrelevance. Indeed, these are just ***some*** of the matters swept up by the Okada Parties' unbounded requests at issue:

(1) Any and "all documents" related to the non-party Wynn Resorts (Macau) S.A.'s ("WRM") acquisition of a Macau gaming license in 2002;

(2) Any and "all documents" related to Wynn Resorts' efforts to obtain a land concession in Cotai (a subsidiary's second Macau location);

(3) Any and "all documents" related to Wynn Resorts' sale of the Macau gaming sub-concession to a third party more than nine years ago;

(4) Any and "all documents" related to government investigations with respect to Wynn Resorts and non-party Wynn Macau, Limited's activities[6];

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[4] The other 500-plus requests are directed to each of the director defendants. Vol. VIII PA 2698-2731 (Chen), Vol. VIII PA 2732-2765 (Goldsmith), Vol. VIII PA 2766-99 (Irani), Vol. VIII PA 2800-33 (Miller), Vol. VIII-IX PA 2834-2867 (Moran), Vol. IX PA 2868-2901 (Schorr), Vol. IX PA 2902-35 (Shoemaker), Vol. IX PA 2936-70 (Sinatra), Vol. IX PA 2971-3004 (Wayson), Vol. IX PA 3005-38 (Zeman). This number does not even include the 117 requests propounded by the Okada Parties on Mr. Wynn, who is separately represented. (Vol. IX PA 3039-93.)

[5] The stipulated deadline to respond to the Fourth Set of Requests is forthcoming.

[6] Wynn Macau, Limited ("Wynn Macau") is a publicly traded company, listed

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(5) Any and "all documents" related to government investigations into the Okada Parties' activities;

(6) Any and "all documents" related to suitability and licensing issues at Wynn Resorts, regardless of any connection to Okada, as well as documents concerning investigations and regulatory findings;

(7) Any and "all documents" related to the Wynn Resorts Board and committee meetings, including all Board materials and minutes, from 2002 to the present, regardless of time or topic;[7]

(8) Any and "all documents" related to the relationship between Okada and Stephen A. Wynn dating back to before 2002; and

(9) Any and "all documents" related to any of Mr. Wynn's past business relationships (potential, contemplated, successful, or unsuccessful) regardless of with whom or when.

(Vol. II PA 1514-59 (2d), Vol. XVII PA 1560-86 (3d).)

Yet it is not just the facial overbreadth of the individual requests that confirms their impropriety: the requests are also patently irrelevant. In challenging Wynn Resorts' objections, the Okada Parties admitted it was not until Wynn Resorts began looking into Okada's activities that he self-servingly developed his purported "suspicions" of Wynn Resorts' conduct arose. (*E.g.,* Vol. XVII PA 3846.)

The best justification the Okada Parties could muster in support of their limitless requests was the fantastical assertion that there "could" have been some improprieties by Wynn Resorts on any of these far-ranging subjects. (*E.g.,* Vol. XI

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on the Hong Kong Stock Exchange. Okada was a board member of Wynn Macau from the time of its listing on the Hong Kong Stock Exchange in Fall 2009 until his February 24, 2012 removal.

[7] Prior to filing their underlying motion to compel, the Okada Parties withdrew their request for all "notes" related to all Board meetings from 2002 to the present, subject to renewing their request in the future. (Vol. XI PA 1927 n.22.) Needless to say, this minor modification did not address Wynn Resorts' concerns or objections.

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PA 1920, Vol. XVII PA 3846.) They make that claim despite the fact that Okada was a board member of both Wynn Resorts and Wynn Macau throughout this entire time period and never many any such assertions. Now, however, the Okada Parties contend it is sufficient to speculate – because they are desperate for a diversion – that it "may be" that individual directors would want to keep secret any purported past improprieties such that years later they engaged in a "pretext" to get rid of the Okada Parties to prevent them from "blowing the whistle" on the same. (Vol. XI PA 1916-17.)

This is beyond nonsense. The forced redemption of Aruze's shares would certainly not discourage him from making specious allegations. It would only encourage him to make specious allegations to distract from his own misconduct, which (not coincidentally) is precisely what he has done. Besides, a right to discovery is not triggered by merely proffering wildly self-serving speculation that "maybe" there is something somewhere on any topic that would prompt the Board of Directors to unanimously deem the Okada Parties unsuitable ***other than*** the facts uncovered by Director Freeh.

But what is even more astonishing is that this guess-work argument actually prevailed. The District Court summarily ordered Wynn Resorts to respond to all 78 requests to which it had objected, without any distinction, analysis, or restraint. (Vol. X PA 3949-59). By definition, the District Court issued a blanket discovery directive without regard to how the actual requests relate to the subject matter of the action, if they even do, and importantly, without any factual showing that there is a basis for the inquiry in the first place. Thus, Wynn Resorts petitions this Court.

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A. The District Court's Blanket Discovery Order Warrants Extraordinary Writ Relief.

Wynn Resorts does not dispute the proper scope of discovery and that it is rightly broad. Discovery is proper for information that is "***reasonably calculated*** to

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lead to the discovery of admissible evidence." NRCP 26(B)(1) (emphasis added); *Harrison v. Falcon Prods., Inc.*, 103 Nev. 558, 560, 746 P.2d 642, 642 (1987). But the requirement that discovery requests be reasonable and calculated must have meaning. Discovery is not without limits. *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 192, 561 P.2d 1342, 1343 (1977). And that is why this Court has recognized and exercised its discretionary authority for the issuance of extraordinary writs to review and limit discovery orders that transcend what the law permits. *E.g., Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 678–79 (2011) (citing *Wardleigh v. Sixth Jud. Dist. Ct.*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183 (1995)).

As this Court has said in the context of discovery rulings, if "the District Court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extra jurisdictional act." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014); *see also Schlatter*, 93 Nev. at 192, 561 P.2d at 1343 (issuing writ on discovery order); *Vanguard Piping v. Eighth Jud. Dist. Ct.,* 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1019 (2013).

This Court has emphasized its discretion to act when a district court's discovery order: (1) requires the disclosure of privileged information; or (2) constitutes a "blanket discovery order[] without regard to relevance." *Las Vegas Sands*, 319 P.3d at 621; *Vanguard Piping*, 309 P.3d 1017 (citing *Valley Health Sys.*, 252 P.3d at 678-79).) In such instances, there is no "just, speedy and adequate remedy in the ordinary course of the law," and thus, without writ review, "the order could result in irreparable prejudice." NRS. 34.170; *Vanguard,* 309 P.3d at 1019. For a blanket discovery order, writ relief is appropriate because "the disclosure of irrelevant matter is irretrievable once made, [thus the petitioner] would effectively be deprived of any remedy from [the District Court's] erroneous ruling if she was required to disclose the information and then contest the validity of the order on direct appeal." *Schlatter*, 93 Nev. at 193, 561 P.2d at 1344.

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When writ review reveals that a discovery order exceeds the jurisdiction of the district court, a writ of prohibition is the "appropriate" remedy to "prevent" the "improper discovery." *Rock Bay, LLC v. Eighth Jud. Dist. Ct.,* 129 Nev. Adv. Op. 21, 298 P.3d 441, 444 (2013); *Valley Health Sys.,* 252 P.3d at 678 n.5; *Wardleigh,* 111 Nev. at 350, 891 P.2d at 1183; *see also Vanguard,* 309 P.3d at 1019 (holding prohibition is the better choice over mandamus). *See generally* NRS 34.320 ("[Writs of prohibition] arrest[ ] the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.").

Additionally, a writ petition raising a discovery issue is appropriate when "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013). This includes, but is not limited to, an "opportunity to define the precise parameters of [a] privilege . . . ." or some other protection from disclosure. *Id; Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (considering writ petition for a discovery issue that "implicate[d] a matter of public importance:" whether a journalist waives the news shield statute protections with respect to the contents of a published article).

B. The District Court's Blanket Discovery Order Gives No Regard to Relevance.

The 78 boundless requests are the very definition of blanket discovery; they are not reasonably calculated to lead to discoverable information concerning claims and defenses at issue. Indeed, all this Court needs to do is take the Okada Parties at their own word. They concede that they have no actual facts upon which to base these requests. (*E.g.,* Vol. XI PA 1920 ("could have raised questions"), 1921 ("may

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have feared").) Thus, they proffer rank speculation as their only means of rationalization.

Unremarkably, this Court and others recognize that wishful thinking does not satisfy the requirement that discovery be "reasonably calculated." *See, e.g., Matter of Halverson,* 123 Nev. 493, 517, 169 P.3d 1161, 1177 (2007) (recognizing that even in the criminal context, this Court has "refused to authorize so-called 'fishing expeditions.'"); *see also E.I. du Pont De Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 423 (D. Del. 1959) ("I can see nothing to support this part of the request ***except a hope that the defendant might find something*** which will help its case. . . . I realize that 'fishing expedition' is no longer a ground of objection to discovery. But, on the other hand, unless the Court requires the moving party to show that there is ***something more than a mere possibility*** that relevant evidence exists, the only appropriate order would be one requiring the party to turn over every scrap of paper in its files as well as the contents of its waste baskets.") (emphasis added).

Nor is conjuncture sufficient. *See Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1326, 1328 (Fed. Cir. 1990) ("[R]equested information is not relevant to 'subject matter involved' in the pending action if the inquiry is based on the party's mere suspicion or speculation. Micro Motion here is unmoored and trolling . . . . A litigant may not engage in merely speculative inquiries in the guise of relevant discovery.")[8]; *Bristol v. Trudon*, No. 3:13-CV 911 JBA, 2014 WL 1390808, at *4 (D. Conn. Apr. 9, 2014) ("The law is well-established that

[8] To the District Court, the Okada Parties cited *Micro Motion* for the proposition that "discovery is allowed to flesh out a pattern of acts ***already known to a party*** relating to an issue ***necessarily*** in the case." (Vol. XVII PA 3841.) Since the Okada Parties' requests are admittedly based on "suspicion" alone (Vol. XVII PA 3840), they fail to meet the standard even they recite.

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discovery requests that are based on pure speculation and conjecture are not permissible . . . .") (internal quotations omitted).

Salacious speculation is all the Okada Parties can muster. Indeed, they are careful never to represent that, as a Board member, Okada ***actually*** raised concerns about any of the transactions about which he now seeks "all documents." Coyly avoiding representations where Okada would be exposed, the best the Okada Parties do is hypothesize that perhaps he "***could have*** raised questions" (Vol. XI PA 1920.) Of course, as a Board member of both Wynn Resorts and non-party Wynn Macau, Okada had a fiduciary duty to pose any questions ***at the time*** if he had a legitimate point. But now that his own misconduct has been exposed, Okada is determined to smear the very Board members with whom he voted and to impose an incalculable burden on Wynn Resorts through a multitude of foundationless discovery requests that wishfully "***may***" reveal some hypothetical wrongdoing, while never articulating what.

The Okada Parties truly outdo themselves when they bluster that Wynn Resorts was out to prevent Okada "from blowing the whistle on the Wynn Parties' potentially corrupt activities in Macau." (Vol. XI PA 1916-17.) But of course, they never identify what these purported activities are or how Wynn Resorts was somehow concerned about what manufactured whistle Okada would blow. Indeed, the only thing the Okada Parties are blowing is smoke. Their argument is circular. Nonsensically, they suggest that the Wynn Resorts Board members were concerned about Okada "blowing the whistle" on some supposed wrongdoing that even Okada presently says he cannot identify.

That Okada is desperate to distract from his conduct in the Philippines is more than apparent. And, contrary to the Okada Parties' hopes and wants, wild hyperbole is not a "factual predicate" to support any "suspicion" much less his

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desired fishing expedition into matters that have nothing to do with this business judgment case. *Matter of Halverson,* 123 Nev. at 517, 169 P.3d at 1177.[9]

The Tenth Circuit addressed similarly reckless rhetoric in *Koch v. Koch Industries, Inc.*, 203 F.3d 1202 (10th Cir. 2000). There, the plaintiffs argued that their "extraordinarily expansive discovery requests" related to "two broad, non-specific allegations contained in their Second Amended Complaint." *Id.* at 1238. The Tenth Circuit aptly held that "[w]hen a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process." *Id.* The appellate court applauded the district court for "appropriately recogniz[ing] that the likely benefit of this attempted fishing expedition was speculative at best." *Id.* (noting also that the "massive amount of documents requested, first weeding out privileged and confidential records, would impose a serious burden and expense . . . .[that] far outweighed their likely benefit").

As the Eighth Circuit has likewise noted: "[w]hile the standard of relevance in the context of discovery is broader than in the context of admissibility . . . , this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). This well-stated principle is

[9] It is charitable to even characterize the Okada Parties' position as speculation as even they do not actually assert this conclusion. Rather, they launch the discovery campaign on the concept of "what if" there are bad acts that support their naked theory of pretext.

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on all fours with this Court's requirement as to the necessity for a factual predicate as held in *Matter of Halverson,* 123 Nev. at 517, 169 P.3d at 1177.

The requests' lack of legitimacy is underscored by the District Court's failure to identify the purported relevancy for any of the disputed requests. *See Clark v. Second Jud. Dist. Court*, 101 Nev. 58, 64, 692 P.2d 512, 516 (1985) ("The district court exceeded its jurisdiction under our ruling in *Schlatter* in ordering the production of the decedent's entire tax returns ***without specifying the items requested and the relevancy thereof***.") (emphasis added). Blanket discovery orders without addressing the relevancy of the actual request (especially such overly broad requests that essentially seek all of the records of two different publicly traded gaming companies – one of which is not even a party to this case) or detailing how the request can lead to the discovery of admissible evidence, constitutes error. *Id.*

In short, the Okada Parties failed to establish any factual predicate remotely establishing their burden of demonstrating the purported relevance for any of the 78 requests to the claims at issue. And, while "[m]uch of discovery is a fishing expedition of sorts, [the rules of civil procedure] allow the Courts to determine the pond, the type of lure, and how long the parties can leave their lines in the water." *Myers v. Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904, 913 (E.D. Tenn. 2008). Here, the District Court's blanket discovery order disregards these obligations. It instead allows for carte blanche discovery of "all documents" sought for each and all of the 78 requests despite the Okada Parties' inability to articulate a factual predicate for a single one of them. This is an improper discovery order under any standard.

C. This Blanket Discovery Order Also Disregards Serious Policy and Privacy Concerns as it Relates to Nevada Gaming Licensees.

The impropriety of such a blanket discovery order is particularly acute here, considering that the ordered production includes sweeping categories of documents

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that companies like Wynn Resorts are required to maintain and share with government regulators, solely due to their status as a gaming licensee.

As the Nevada Legislature makes clear, "[t]he gaming industry is vitally important to the economy of the State and the general welfare of its inhabitants." NRS 463.0129(a). And, a gaming license in Nevada is not a right; but rather a privilege. NRS 463.0129(d). With that privilege comes heightened responsibilities owed to the public and to the State of Nevada. Indeed, Nevada gaming licensees are "strictly regulated" to, among other things, "ensure that gaming is free from criminal and corruptive elements" and to maintain "[p]ublic confidence and trust." NRS 463.0129(b)-(c). Like other licensees, Wynn Resorts is charged by law to strictly comply with the gaming regulations to which it is subject. This includes, among other things, an open door relationship with state regulators, creating and implementing a self-policing policy, and taking any and all other steps necessary to be compliant with the gaming regulations.

The Nevada Legislature enacted NRS 463.140, which outlines the broad power and duties of the Gaming Control Board and the Nevada Gaming Commission. Stated bluntly, the state gaming regulators are afforded unprecedented access to the licensee's business, records, and information. Regulators can inspect all gaming premises, "summarily seize and remove. . . documents or records," and "demand access to and inspect, examine, photocopy and audit all papers, books and records" of any licensee. NRS 463.140(2)(a), (c), (d), (e). Of course, the regulators also can issue subpoenas or compel the attendance and testimony of witnesses. NRS 463.140(5). Because the licensee must do as asked or instructed by the regulators, the more common scenario is that the regulators ask, and the licensee provides any and all requested information.

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1. The District Court's blanket discovery order ignores the statutory presumption of confidentiality.

Because of the aforementioned open door and the "can't say no" policy between the regulators and licensees, the Nevada Legislature afforded statutory protections to licensees, in NRS 463.120, among others. The main statutory provision provides:

> 4. Except as otherwise provided in this section, all information and data:
>
> a) ***Required by the Board or Commission to be furnished to it*** under chapters 462 to 466, inclusive, of NRS or any regulations adopted pursuant thereto or which may be otherwise obtained relative to the finances, earnings or revenue of any applicant or licensee;
>
> (b) ***Pertaining to an applicant's or natural person's criminal record, antecedents and background*** which have been furnished to or obtained by the Board or Commission from any source;
>
> (c) ***Provided to*** the members, agents or employees of the ***Board or Commission by a governmental agency or an informer or on the assurance that the information will be held in confidence and treated as confidential***;
>
> (d) ***Obtained by the Board from*** a manufacturer, distributor or ***operator***, or from an operator of an inter-casino linked system, relating to the manufacturing of gaming devices or the operation of an inter-casino linked system; or
>
> (e) Prepared or ***obtained by an agent*** or employee of the Board or Commission ***pursuant to an audit, investigation, determination or hearing***,
>
> are ***confidential*** and may be revealed in whole or in part only in the course of the necessary administration of this chapter or upon the lawful order of a court of competent jurisdiction. . . . Notwithstanding any other provision of state law, such information may not be otherwise revealed without specific authorization by the Board or Commission.
>
> 5. Notwithstanding any other provision of state law, any and ***all information and data*** prepared or ***obtained by an agent*** or employee of the Board or

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> Commission relating to an application for ***a license, a finding of suitability or any approval*** that is required pursuant to the provisions of chapters 462 to 466, inclusive, of NRS or any regulations adopted pursuant thereto, are ***confidential and absolutely privileged*** and may be revealed in whole or in part only in the course of the necessary administration of such provisions and with specific authorization and waiver of the privilege by the Board or Commission . . . . .

NRS 463.120 (emphasis added).

These confidentiality and privilege protections go hand in glove with the open relationship between the regulators and gaming licensees, and recognize Nevada's strong interest in maintaining confidential investigations related to its licensees. *See, e.g., In re Smith*, 397 B.R. 124, 126 (Bankr. D. Nev. 2008). But the District Court's blanket discovery order below tramples these regulatory concerns.

And, the Okada Parties make no secret of their desire to circumvent these regulatory requirements so as to learn what the gaming authorities know about them. They propounded broad requests seeking, among other things, "All Documents" between Wynn Resorts and the Nevada Gaming Control Board (as well as other governmental entities) about Okada, Universal, Aruze, or "their affiliates":

> **REQUEST FOR PRODUCTION NO. 215**:
> All Documents concerning Communications between WRL and the NGCB, the FBI, DOJ, and/or the Philippine Department of Justice concerning Mr. Okada, Universal, and/or Aruze USA and their affiliates.

(Vol. VIII PA 1767.)

Wynn Resorts objected to Request No. 215, citing NRS 463.120, among other things. (*Id.*) Of course, Wynn Resorts does not dispute that these "confidential" documents by and between Wynn Resorts and Gaming may be compelled "upon the lawful order of a court of competent jurisdiction." NRS 463.120(4). But, the law obviously requires the "court of competent

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jurisdiction" to do more than issue a blanket discovery granting the motion, as the District Court did here.[10]

"Where a court of competent jurisdiction is authorized to order discovery of confidential records, the court must balance the public interest in avoiding harm from disclosure against the benefits of providing relevant evidence in civil litigation . . . ." *In re Smith*, 397 B.R. at 129 (discussing compelling documents that are "confidential" pursuant to NRS 463.120) (quoting *Laxalt v. McClatchy,* 109 F.R.D. 632, 635 (D. Nev.1986) (*Laxalt I*) (discussing compelling confidential records in general)). In considering NRS 463.120 and the necessary analysis to compel "presumptively confidential records," the Nevada federal bankruptcy court in *In re Smith* looked to a Nevada federal district court decision and to the Ninth Circuit's four-part test:

> Initially, the relevance of the evidence must be taken into account. Further, the availability of other evidence and the government's role in the litigation must be considered. Finally, the court noted that the extent to which disclosure would hinder frank and independent discussion regarding the agencies contemplated decisions and policies would factor into the court's decision.

In re Smith, 397 B.R. at 130 (citing *Laxalt v. McClatchy,* 116 F.R.D. 455, 459 (D. Nev. 1986) (*Laxalt II*) (citing *Fed. Trade Com'n v. Warner Commc'ns, Inc.,* 742 F.2d 1156, 1161 (9th Cir. 1984)). Nevada's federal district court expressly noted that sister courts with similar review processes "believe when a claim of

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[10] While Wynn Resorts recognizes that the District Court Order compels Wynn Resorts and not the Gaming authorities to produce these confidential records, the confidentiality and the purposes for the statutory protection are not eliminated. Nevertheless, it bears noting that the Nevada Legislature expressly stated that "[t]he Commission and the Board may refuse to reveal, in any court or administrative proceeding except a proceeding brought by the State of Nevada, the identity of an informant, or the information obtained from the informant, or both the identity and the information." NRS 463.144. While the Okada Parties seek to circumvent the Gaming Control Board by issuing a Rule 34 request in the instant litigation, the gaming authorities should still be able to invoke their separate statutory right to refuse to reveal any information that they may have received from Wynn Resorts.

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privilege, confidentiality or irrelevance is raised the court has a duty to conduct an *in camera* inspection to separate and permit discovery of only the relevant documents, thereby protecting against unnecessary and damaging disclosure of irrelevant confidential material." *Id.* (quoting *Berst v. Chipman,* 653 P.2d 107, 113 (Kan. 1982).)

Yet, the District Court here gave no consideration to these policies either at the hearing or in the Order. (Vol. X PA 3949-59, Vols. IX-X PA 3861-3948.) Indeed, the purpose of the statutory protections afforded gaming licensees, the powers and duties of the gaming authorities, and, most generally, the overall policy behind the statutory framework designed to regulate the gaming industry – while also balancing the public policy that recognizes its unmatched contribution to Nevada – are not addressed or even mentioned by the District Court's blanket discovery order. (*Id.*)

2. The District Court's blanket discovery Order ignores that Macau gaming licensees are statutorily mandated to keep their tender and concession-related records confidential.

Similarly, the government of Macau has enacted a statutory framework that regulates its gaming concessionaires and their affiliates. Macanese law also provides for confidentiality of documents and data related to the regulatory entities' role, duties, and authority. Specifically, Macanese Law 16/2001 establishes the legal framework for the operation of games of chance in casinos. Article 16 of Law 16/2001 (unofficially) translates as follows:

> The bidding processes, the documents and data included therein, as well as all documents and data relating to the tender, are confidential and access to or consultation of such documents by third parties is prohibited, and for this purpose the provisions of article 63 to 67 and 93 to 98 of the Codigo de Procedimento Administrativo ("Code of Administrative Proceedings"), approved by Decree-Law no. 57/99/M of October 11 are not applicable.

Macau Law 16/2001, Art. 16.

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Pursuant to this law, documents related to the bidding process, tender, and concession are confidential, and third parties are prohibited from access to or consultation of those documents. This law is buttressed by the language of the concession agreement itself. Clause 92 of the concession agreement provides additional confidentiality protections to concessionaires beyond the bidding and tender process. The clause breaks down into three parts, which (unofficially) translate as follows:

> 1. The documents produced by the Government or by the concessionaire, in keeping with the conditions of law or the present concession contract, have a confidential character, and can only be made available to third parties with the authorization of the other Party.
>
> 2. The Government and the concessionaire take all the necessary steps to ensure that, respectively, the workers of the Public Administration of the Macau Special Administrative Region, and the workers of the concessionaire are bound by the duty of secrecy.
>
> 3. The Government and the concessionaire undertake to enforce the duty of secrecy on other persons who have had or who might have access to confidential documents, namely through consulting services and other contracts.

(Vol. XVI PA 3526-27.)

Similar to the Nevada Legislature empowering the Nevada gaming regulatory authorities to enact gaming regulations, the Macanese gaming regulatory arm, the Dirrecção de Inspecção e Coordenação de Jogos ("DICJ"), enacted what it calls instructions. Article 8 of DICJ's Instruction 1/2014 provides for the confidentiality of personal information gathered by gaming concessionaires and sub-concessionaires.[11] Article 8 of DICJ Instruction 1/2014 (unofficially) translates as follows:

> Without prejudice to the legal framework for the protection of personal data set forth in Law 8/2005, the

[11] This instruction is specific to the Macau gaming concessionaires and sub-concessionaires, and is distinct from the Macau Personal Data Privacy Act which this Court addressed in *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 61, 331, P.3d 876 (2014).

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> personal data collected by the gaming concessionaires and sub-concessionaires is subject to the confidentiality regimen set out in the legal framework governing the concession of the exploration of games of chance in a casino which includes law 16/2001, Administrative Regulation 6/2002 as revised and re-published by Administrative Regulation 27/2009, Law 5/2004, and Law 10/2012, as well as the respective gaming concession and sub-concession agreements, with any transfer of personal data being prohibited without the prior authorization of the competent public entities.

DICJ Instruction 1/2014, Article 8.

But again, the District Court gave no consideration of these restrictions. The point Wynn Resorts makes here is that the District Court failed to consider gaming policy and the duties of a licensee (or concessionaire under Macau law) when it issued its blanket discovery Order that compels a licensee/concessionaire to produce statutorily protected documents without any relevancy analysis to the issues in dispute.

Specifically, the Okada Parties propounded six requests seeking documents related to Wynn Resorts' affiliate, non-party WRM's, bidding and tender process. (Vol. VII 1641 (Req. No. 89), 1665 (Req. No. 114), 1676 (Req. No. 123), 1677 (Req. No. 124), 1679-80 (Req. No. 126), Vol. XI PA 1805 (Req. No. 249).) Of course, if non-party WRM violates Law 16/2001, it will be subject to sanctions in Macau. Law 16/2001 was passed by the legislative council of Macau and signed into effect by the Chief Executive. The regime for handling infractions is set out in Article 43 of Law 16/2001 and contemplates both administrative proceedings (fines) and possible criminal proceedings (sub-section (3)). The Okada Parties failed to assert any factual basis to connect WRM's bidding and tender process to this case, and failed to provide a factual predicate for any purported wrongdoing by this non-party. Yet, the blanket discovery Order sweeps this third party into the mix, compels the production of records that are statutorily protected by a foreign sovereign and which may result in sanctions against foreign, non-party WRM, without providing any analysis or discussion.

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In addition, the Okada Parties propounded ***52 individual requests*** desperately seeking to gather documents related to Wynn Resorts' efforts to obtain a concession for land (akin to a lease) in the part of Macau called the Cotai Strip. (Vol. VII PA 1665 (Req. No. 114), 1669 (Req. No. 118), 1672 (Req. No. 120), 1674 (Req. No. 122), 1678 (Req. No. 125), 1650-1709 (Req. Nos. 127-149), 1711 (Req. No. 152), 1726 (Req. No. 166), 1727 (Req. No. 167), Vol. XVIII PA 1759 205, 1760 206, Vol. XV PA 1805 (Req. No. 249), 1806-07 (Req. No. 250), 1817-26 (Req. Nos. 259-266), 1829-39 (Req. Nos. 269-277).) The Okada Parties would like to argue that Wynn Resorts did something wrong or improper in the process to obtain that land concession for a new casino development. But, there is no factual predicate to connect the land concession to the subject matter at issue in this action. And, there is no factual predicate to support the notion that there was any wrongdoing in the first instance. The process by which Wynn Resorts obtained the land concession commenced in 2005, took place over several years, and was fully disclosed in multiple Wynn Resorts public SEC filings, (*E.g.,* Vol. XVI PA 3573-75, 3576-78, 3579, 3606-07), and from the time it listed on the Hong Kong Stock Exchange in 2009, multiple Wynn Macau public Hong Kong Stock Exchange filings. (*E.g.,* Vol. XVI PA 3583-84, 3606-07.) Moreover, Okada was a Wynn Resorts and Wynn Macau director when WRM and an affiliate accepted the land concession in September 2011, and there was no argument or evidence offered that he ever questioned the transaction at any step during the process. (*See* Vol. XVII PA 3831-34.)

Similarly, the Okada Parties now want to scrutinize Wynn Resorts' 2006 sale of its Macau gaming sub-concession to a third party, Publishing & Broadcasting, Ltd., propounding ***seven more requests*** demanding records related to the sub-concession and the sale process. (Vol. VII PA 1665 (Req. No. 114), 1669 (Req. No. 118), 1671 (Req. No. 119), 1672 (Req. No. 120), 1674 (Req. No. 122), 1678 (Req. No. 125), Vol. XI PA 1839 Req. No. 278).) The Okada Parties argue

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that they want to know why and how Wynn Resorts was able to get a third party to pay $900 Million for the sub-concession, which is one of only six licenses to legally operate gaming establishments in Macau. (*E.g.,* Vol. XVI PA 3583.) The inquiry is silly, and the answer can be provided by basic microeconomics. However, for the instant debate about the impropriety of the blanket discovery Order, the sale of the sub-concession relates to no issue in this litigation. (Vol. VI PA 1375-1400, 1401-1412-95.)

And, there is no factual predicate upon which to base an argument of wrongdoing through the sale of the valuable sub-concession. Of course, the sub-concession process was disclosed in the Company's public filings. And, once again, Okada was a director of Wynn Resorts during the relevant time period and never inquired into or questioned the transaction (a transaction that benefitted the Wynn Resorts stockholders, including Aruze, and which the Okada Parties have never disputed, much less offered any evidence to the contrary). (Vol. XIV PA 3104.)

None of these requests were considered individually, nor were the gaming related policies, laws, and obligations that are expressly implicated by the requests. Instead, they were swept up into the District Court's blanket discovery Order. The District Court exceeded its jurisdiction by entering the improper blanket order without regard to any of the above-stated issues, most importantly, whether any of them are relevant to this case or whether there is a factual predicate for the Okada Parties' speculative arguments made in support thereof.

3. The District Court's blanket discovery Order ignores that Nevada gaming licensees are statutorily mandated to create and implement a compliance program, and report its results to the gaming regulators.

Such a blanket discovery order is particularly problematic vis-à-vis Nevada's highly regulated gaming industry, since gaming regulators require licensees to maintain extensive records on transactions and people with whom the

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licensee does business. Tellingly, the Okada Parties do not seek discovery as to Wynn Resorts' knowledge about transactions or matters involving the Okada Parties. No, as the Okada Parties themselves described their requests, they seek (i) all "documents regarding ***any*** suitability investigations conducted by the Compliance Committee [of the Wynn Resorts board], or suitability concerns raised by regulatory authorities," (Vol. XI PA 1926 n.19 (identifying Request Nos. 230-234, 240-242, and 289)), and (ii) all documents regarding "specific persons who should have raised suitability concerns," (*id.* at n.20 (identifying Request Nos. 230-234, 289) (emphasis added).)

While some of these requests impinge upon the same confidentiality provisions discussed above, some also seek the same type of documents related to this Nevada gaming licensee's licensing process in other jurisdictions (which would have similar if not the same purpose as the Nevada policy discussed above). Examples are:

> **REQUEST FOR PRODUCTION NO. 230**:
> All Documents concerning the loss or potential loss or revocation of gaming licenses held by WRL or any Counterdefendant from any state or local gaming regulatory body in the United States.
>
> **REQUEST FOR PRODUCTION NO. 231**:
> All Documents concerning any determination of unsuitability of WRL or any Counterdefendant by any gaming regulatory body not located in the United States.
>
> **REQUEST FOR PRODUCTION NO. 232**:
> All Documents concerning any potential or threatened determination of unsuitability of WRL or any Counterdefendant by any gaming regulatory body not located in the United States.
>
> **REQUEST FOR PRODUCTION NO. 233**:
> All Documents concerning the loss or revocation of gaming licenses held by WRL or any Counterdefendant from any gaming regulatory body not located in the United States.

(Vol. VIII PA 1783-86.)

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REQUEST FOR PRODUCTION NO. 240:
All Documents concerning any Investigation conducted by WRL's Gaming Compliance Committee pursuant to the requirement (referred to in Paragraph 14 of the Second Amended Complaint) that it "investigate senior officers, directors, and key employees to protect WRL from becoming associated from [sic] any unsuitable persons."

REQUEST FOR PRODUCTION NO. 241:
Documents sufficient to identify all subjects of Investigations conducted by WRL's Gaming Compliance Committee related to the Committee's requirement (referred to in paragraph 14 of the Second Amended Complaint) that it "investigate senior officers, directors, and key employees to protect WRL from becoming associated from [sic] any unsuitable persons."

REQUEST FOR PRODUCTION NO. 242:
All Documents concerning any Investigation conducted by WRL's Gaming Compliance Committee concerning the potential determination of Stephen A. Wynn as an unsuitable party by any gaming regulatory body.

(Vol. VIII PA 1792-95.)

REQUEST FOR PRODUCTION NO. 289:
All Documents Concerning any consideration or decision whether or not to seek a finding from any Gaming Authority of the suitability of any of the following: Stephen A. Wynn, any member of the WRL Board (except Mr. Okada), any counterdefendant, or WRL.

(Vol. XI PA 1849-50.) Trying to rationalize these requests, the Okada Parties resort to claiming that Wynn Resorts' commitment to compliance and the protection of its gaming licenses "is a sham because WRL routinely associated with potentially unsuitable persons without any investigation by the Compliance Committee." (Vol. XI PA 1926.)[12]

But of course, Okada made no such noise when he served on the Board. His current hyperbole is as specious as it is desperate. All Nevada gaming licensees,

[12] Wynn Resorts agreed from the time of its original objections and responses to produce some documents in response to the requests in this category – namely, documents that relate to the compliance fallout from the Okada Parties' misconduct and therefore documents that relate to the subject matter of this action. (Vol. VIII PA 1782-87 (Responses to Req. Nos. 230-34).)

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including Wynn Resorts, are obligated to police themselves through a statutorily-mandated compliance committee and compliance program. The Okada Parties present no evidence of any supposed "sham" regarding Wynn Resorts' compliance obligations. Rather, the actions the Wynn Resorts Board took ***were required*** to fulfill the Company's obligations under Nevada's gaming regulations.

As previously explained to the District Court, Nevada law affirmatively requires licensees and registrants to take independent and proactive steps toward ridding themselves of unsuitable persons before gaming regulators have to do it for them. Indeed, for this reason, other public companies have "unsuitable person" and redemption provisions in their organizational documents that are essentially identical to the provisions in Article VII of the Wynn Resorts Articles of Incorporation. (Vol. III PA 549-50.)

In addition, the Gaming Commission and Gaming Control Board, exercising authority under Gaming Commission Regulation 5.045, requires Wynn Resorts to maintain and follow a "Compliance Program" that is reviewed and approved by the Commission and the Control Board. (Vol. III PA 547-49.) That program specifically states that its purpose is to mitigate the "dangers of unsuitable associations and compliance with regulatory requirements," and it defines an "Unsuitable Person" as anyone "that the Company determines is unqualified as a business associate of the Company or its Affiliates based on, without limitation, that Person's antecedents, associations, financial practices, financial condition, or business probity." (Vol. III PA 585, 588.)

The Compliance Program affirmatively requires the Company's Compliance Committee to *investigate* all senior executives, directors, and key employees, "in order to protect the Company from becoming associated with an Unsuitable Person." (Vol. III PA 592.) The program also requires the Company to report to Nevada gaming authorities to keep them "advised of the Company's compliance efforts in Nevada and other jurisdictions." (Vol. III PA 585.) In particular, the

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Compliance Program requires that "any known acts of wrongdoing" by any executive or director that are reported to the Wynn Resorts Board must also be reported to the Chairman of the Nevada State Gaming Control Board within ten business days of the report to the Board. (Vol. III PA 595.)

Thus, under the Nevada gaming regulations, Wynn Resorts has an affirmative obligation to self-police. The documents it is required to generate and provide to the Gaming authorities in this respect are highly confidential, highly sensitive, and – most notably – have absolutely nothing to do with the Okada Parties' claims. Again, the Okada Parties have not provided a single factual predicate for this invasive fishing expedition. The fact that there may exist thousands of documents as a result of Wynn Resorts' compliance with Nevada law – to maintain the privilege of being a gaming licensee – does not, without a factual predicate, grant its litigation adversaries access to those documents. The District Court erred in entering a blanket ruling that would compel the production of confidential and sensitive documents that a gaming licensee is required to prepare and maintain about those with whom a licensee does business.

4. The District Court's Blanket Discovery Order ignores the lack of relevancy of the financial information in the compelled documents.

Likewise, the information gathered for applications, investigations, suitability inquiries, and compliance programs is highly sensitive, personal and financial information. The District Court's blanket discovery Order compels the production of personal financial information of Wynn Resorts' Board members, as well as any other third party who may be swept up in the net of the Compliance Committee's procedures and investigations. (*Compare* Vol. X PA 3949-59, *with* Vols. VII-VIII PA 1628-1796, *and* Vol. XI PA 1797-1872.) There is no basis to allow the Okada Parties access to the financial records of these Board members and third parties, yet the blanket discovery order does just that. On this point alone, the District Court's Order constitutes error pursuant to this Court's decision in *Schlatter* and its progeny.

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In *Schlatter*, this Court recognized that when a litigant puts her income at issue, and there is a showing that the financial information is not otherwise obtainable, then "a court may require disclosure of matter contained in tax records which is relevant to this issue." 93 Nev. at 192, 561 P.2d at 1343. However, respecting the privacy of the party whose financial records were ordered produced (rather than just third parties), this Court was quick to note that the District Court's "order went beyond this and permitted carte blanche discovery of all information contained in these materials without regard to relevancy." *Id.*, 561 P.2d at 1343-44. Noting that the "discovery rules provide no basis for such an invasion," this Court issued a writ, holding that the district court exceeded its jurisdiction by ordering disclosure of information neither relevant to the tendered issues nor leading to discovery of admissible evidence." *Id.*, 561 P.2d at 1344.

Here, the effect of the District Court's blanket discovery order is to compel Wynn Resorts to produce, among many, many other things, personal financial information of the Board member defendants (whose business judgment as a director is their only act at issue) as well as hundreds or thousands of individuals who have been swept into the Company's self-policing compliance investigations and procedures required of a gaming licensee. This blanket Order, of course, was entered without regard to subject matter much less to whether the information in the materials sought would be relevant to the subject matter at issue. It is not.

D. The District Court's Blanket Discovery Order Allows Unfettered Discovery to a Competitor.

The District Court's blanket discovery Order further ignores the unfettered discovery allowed to a competitor, who already has shown a disregard for the protective order in place in this action.[13] Where a competitor seeks broad access to

[13] Specifically, and despite Wynn Resorts' best efforts, the Okada Parties have given documents deemed confidential under the Protective Order to third parties,

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a company's records, a writ of mandamus properly issues where a "protective order does not adequately safeguard the confidentiality of the" records. *Ex parte Miltope Corp.*, 823 So.2d 640, 645 (Ala. 2001).

In *Miltope*, the defendant, who worked for Miltope's competitor, demanded discovery of "all documents which relate, refer to or reflect meetings of Miltope's Board of Directors, division reviews or the equivalent between October 28, 1998 and the present, including, but not limited to all meeting minutes, notes and materials presented during such meetings[.]" *Id.* at 642. The trial court ordered Miltope to produce the documents but entered a protective order limiting the uses and dissemination of the documents. *Id.* The Alabama Supreme Court determined that the minutes of the board constituted a trade secret as they were used in business; embodied in a compilation not publicly known; could not be readily ascertained from public knowledge; were secreted from the public; and had economic value. *Id.* at 644. Thus, even with the protective order in place, the court concluded that the trial court abused its discretion in compelling Miltope to produce the minutes of its board of directors. *Id.* at 645.

Similarly here, the Okada Parties asked for and the District Court ordered production of "all documents, presentations, reports, notes, and minutes Concerning each meeting of the WRL Board from 2002 to the present" with oft-repeated assurances that there would be no public dissemination given the protective order in

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and the information has appeared in news articles, among other things. (Vol. VIII PA 1884 n.7; Vol. VII PA 1599-1600; *see also* Vol. V PA 1126-1127.) The Okada Parties' assurances regarding protecting highly confidential or sensitive information are near meaningless under these circumstances, especially when given to an adversary who has publicly stated his desire and intent to "beat" Wynn Resorts. (Vol. V PA 1130.)

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place. (Vol. XI PA 1843; Vol. XVII PA 3855 n.13.)[14] However, the protective order is insufficient to protect the disclosure of Wynn Resorts' confidential, proprietary, and non-public information from the Okada Parties, which are admittedly developing their own gaming operation and are a Wynn Resorts competitor. The Okada Parties' cries of "maybe" finding something to recast as supposed "pretext" are insufficient to overcome the irreparable harm that Wynn Resorts suffers if forced to disclose all of its Board of Directors packets from its inception.

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[14] The Okada Parties proposed withdrawing "notes" from this Request. *See supra* note 7.

V. CONCLUSION

The District Court's unbounded order of production for 78 different discovery requests is the definition of blanket discovery Order. The District Court made no relevancy analysis whatsoever. That is hardly remarkable considering that the party propounding these overbroad requests – the Okada Parties – could themselves not articulate any actual factual predicate for the requests. Thus, all they could proffer self-serving speculation couched in the tell-all terms of "maybe", "could have" or "possibly." None of that provides a basis for discovery, let alone the scorched earth approach advanced by the Okada Parties. That they are in need of a deflection for the facts considered by Wynn Resorts' Board of Directors in redeeming the shares – facts that cannot be attacked because this is a matter that falls within the Board's business judgment – only highlights the impropriety of these requests and the Order compelling Wynn Resorts to produce. This is on top of the impropriety of an order requiring the production of confidential and protected information, including that of unrelated third-parties. Thus, this Court should enter a writ setting aside the District Court's blanket discovery Order.

DATED this 17th day of July, 2015.

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VERIFICATION

I, Todd L. Bice, declare as follows:

1. I am one of the attorneys for Wynn Resorts, Ltd., the Petitioner.

2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.

3. I, as legal counsel, am verifying the petition because the question presented is a legal issue as to the proper scope of a discovery order under this Court's precedence which is a matter for legal counsel.

4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is execution on 17th day of July, 2015 in Las Vegas, Nevada.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 10, 659 words.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 17th day of July 2015, I electronically filed and served a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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